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A steady ship: A quiet year for the United Kingdom Supreme Court

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The Supreme Court in 2014

2014 was a relatively quiet year for the UK Supreme Court. For a start, there were no changes of personnel. Barring unforeseen circumstances there will again be no changes during 2015, since the next retirement amongst the 12 Justices (that of Lord Toulson) is not due until September 2016. In addition, the number of decisions published in 2014 (68) was more or less in line with the annual average since the Court's formation in 2009: the figure of 81 decisions in 2013 now looks like a blip. And there were fewer than usual high-profile appeals, the only really prominent decision being that in the assisted suicide case of *Nicklinson* [2014] UKSC 38.

Appeals heard

Astonishingly Lord Neuberger, the President of the Court, sat in 46 of the decided cases (68%) and Lady Hale, the Deputy President, sat in 34 (50%). The other Justices sat in between 22 and 32 cases. Seven of the cases were dealt with by more than five judges: six engaged seven judges but only one (*Nicklinson*) engaged nine.

In all, 82 appeals were dealt with within the 68 decisions issued. As in the two previous years a sizeable number were Scottish appeals (11 – 13%), with three from Northern Ireland. The success rate was 48% (39 appeals), which is exactly the same percentage as in 2013. At least 30 of the 82 appeals related to applications for judicial review.

Judgments issued

Once again a noticeable feature of the 2014 decisions was the number that took the form of sole judgments. There were 36 of these (53%), with each Justice delivering at least one. This is similar to the figure of 57% for 2013. Lord Neuberger, Lord Kerr and Lord Reed each delivered five sole judgments. Under Lord Neuberger's presidency there has been a clear move towards producing decisions to which all of the sitting Justices can subscribe, the aim being to make the law more certain.

But old habits die hard. In *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, a case on whether noise caused by motor sports constituted a nuisance, Lord Neuberger issued the longest single judgment of the year (153 paragraphs), with which his four colleagues all agreed. But Lords Mance, Sumption and Clarke each felt that they had to add a few supplementary paragraphs of their own, while Lord Carnwath took as many as 75 paragraphs to explain his reasoning in his preferred words.

Lord Neuberger delivered the highest number of judgments overall (22), and Lady Hale the next highest (18). Each of the other Justices delivered between 9 and 14 judgments. In total, 149 judgments were issued, an average of just over two per case. The average length of decisions rose to 85 paragraphs per case, up from an average of 71 in 2013. *Nicklinson* was by far the longest (366 paragraphs), and four other cases required more than 200 paragraphs. But 12 cases were dealt with in fewer than 35 paragraphs.

Dissents and *ad hoc* judges

The age of dissent is far from dead, for there were dissenting judgments (in whole or in part) in 14 cases (22%), up from 14% in 2013. There were eight cases in which the Justices were split 3 v 2 on one or more key issues, and one in which they were split 4 v 3 (this was *Surrey*

County Council v P [2014] UKSC 19). Strangely, all 12 Justices were on the minority side in at least one of these cases, with Lords Kerr and Wilson appearing twice and Lord Carnwath three times. Lord Wilson was the most prolific dissenter overall: he disagreed with his colleagues in five of the 24 cases in which he sat.

One of the three *ad hoc* judges who sat during the year, Lord Collins, also dissented in one of his two cases. Lord Dyson MR and Lord Thomas CJ sat in one case apiece as *ad hoc* judges, the latter in *In re Agricultural Sector (Wales) Bill* [2014] UKSC 43. This was a fulfilment of Lord Neuberger's promise in 2013 that, on any appeal involving Welsh devolution issues, the Supreme Court panel would if possible include a judge who has specifically Welsh experience and knowledge (the LCJ, of course, is Welsh). In the case in question the Supreme Court upheld the competence of the Welsh Assembly to make the Bill at issue but pointed out that, just because the Government of Wales Act 2006 is of great constitutional significance, this cannot by itself be taken as a guide to its interpretation: it has to be interpreted in the same way as any other statute.

Subject matter

There was the usual eclectic mix of topics dealt with in the appeals, but besides the public law cases dealt with through judicial review there was a sizeable number of civil damages claims (12) and of land and housing cases (8). Human rights featured in 17 cases. There were, by my reckoning, four cases in each of the categories of criminal law, trust law, commercial law, tax law and constitutional law. There were just two or three concerned with immigration law, employment law, company law, family law or succession law. EU law was considered in six cases and just one reference was made to the Court of Justice in Luxembourg (*HM Revenue and Customs Commissioners v Secret Hotels 2 Ltd* [2014] UKSC 16).

Judicial deference

The public law cases tended to display judicial restraint. When a group of peers and MPs complained about the government's refusal to let an Iranian dissident into the UK to address a meeting, all but Lord Kerr agreed with the government's line (*R (Lord Carlile) v Home Secretary* [2014] UKSC 60). However they did so after making their own assessment of the proportionality of the dissident's exclusion and upbraided the Court of Appeal for merely asking itself if the Home Secretary had approached the matter lawfully.

Similarly, in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3 seven Justices upheld the government's handling of the HS2 railway project, saying that using the hybrid Bill procedure in Parliament would not breach any EU Directive. But the fact that the Supreme Court was itself prepared to consider what parliamentary procedure was appropriate in this context is itself an indication that at times judges are willing to come close to challenging the supremacy of Parliament, at least when EU law is involved.

In *R (Sandiford) v Foreign Secretary* [2014] UKSC 44 the Supreme Court upheld the Foreign Secretary's 'blanket' policy of not paying for legal representation for British citizens facing trials abroad, even if the person is confronting the death penalty, as Mrs Sandiford was in Indonesia. The Justices ruled that Mrs Sandiford was not within the UK's 'jurisdiction' for the purposes of the ECHR, but they did urge the Foreign Secretary to re-consider her application for legal assistance.

The decision in *Nicklinson* perhaps illustrates better than any other the range of judicial attitudes within the Court to judicial activism. Five Justices thought that they did have the constitutional authority to make a declaration that the general prohibition on assisted suicide in section 2 of the Suicide Act 1961 was incompatible with Article 8 of the ECHR (the right to a private life). But four Justices thought that the matter was better left to Parliament's assessment. Of the five 'activists' only two wanted to issue a declaration (Lady Hale and Lord Kerr), while the other three declined to do so (Lords Neuberger, Mance and Wilson). The four judges preferring a more restrained approach were Lords Sumption, Clarke, Hughes and Reed. Lord Toulson heard the case at the Court of Appeal, where he too made it clear that he approved of a more restrained approach. We do not know how the remaining Justices, Lords Carnwath and Hodge, would have decided the case but it is in any event clear that the Court is fairly evenly divided as regards the appropriateness of treading on Parliament's toes.

Human rights

In other cases the Supreme Court was more sympathetic to human rights claims. In *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35 it confirmed a declaration of incompatibility in relation to sections in the Police Act 1997 which allowed the disclosure in enhanced criminal record certificates of cautions and warnings issued many years earlier for minor offences. The majority of the Court (Lord Wilson dissented) said the sections breached the requirement of legality because they provided no safeguards against arbitrary interference and failed the test of being necessary in a democratic society.

In *R (EM (Eritrea)) v Home Secretary* [2014] UKSC 12 the Court ruled that the fact that there was a presumption that all EU states would comply with their international obligations regarding asylum claims did not remove the need to examine evidence as to whether in fact those obligations would be fulfilled in a particular state (in this case Italy). The applicant does not need to show that there is a *systemic* defect in a country's processes.

On the other hand, in a further case concerning asylum, *IA (Iran) v Home Secretary* [2014] UKSC 6, the Supreme Court held that, just because the applicant had been granted refugee status by the UN High Commissioner for Refugees in both Iraq and Turkey, this did not create a presumption in favour of his being granted refugee status in the UK. Nor did it shift to the government the burden of proving that its decision to refuse asylum was wrong.

In *A v BBC* [2014] UKSC 25 the Justices confirmed that courts have an inherent power to make exceptions to the open justice principle by withholding certain information from public disclosure, including the identity of parties or witnesses, not just to protect the public interest in the administration of justice but also to protect an individual's right not to be subjected to inhuman or degrading treatment or punishment. Here the Court kept secret the identity of a man who was being deported after committing sex offences against children.

Dialogue with the ECtHR

On three occasions the Justices engaged significantly with jurisprudence of the European Court of Human Rights. In *Surrey County Council v P* [2014] UKSC 19 they held by 4 v 3 that the disabled appellants were indeed being deprived of their liberty by the manner in which they were being cared for in residential premises. The dissenters (Lords Carnwath, Hodge and Clarke) were of the view that the Strasbourg Court had not yet gone so far as to characterise this kind of living arrangement as a deprivation of liberty.

In *Kennedy v The Charity Commission* [2014] UKSC 20 the majority concluded that the Grand Chamber of the Strasbourg Court had not yet interpreted Article 10 of the ECHR in such a way as to impose on public authorities a freestanding duty to disclose information. Lords Wilson and Carnwath disagreed on the basis that it seemed likely that the European Court would soon move to assert such a duty. Unfortunately no Justice was able to find a rule within the common law which imposed a similar duty.

In *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66 the Court had to consider whether it was a breach of Article 5 of the ECHR not to provide opportunities for rehabilitation to prisoners whose release depended on their being able to demonstrate that their continued detention was no longer necessary for public protection. Ingeniously the Justices held that, while such an ancillary duty can be implied into Article 5, which if breached can give rise to compensation, a breach would not of itself render the detention unlawful. This goes directly against the position as stated in *James v UK* (2012) 56 EHRR 399 and the Strasbourg Court will no doubt have something to say about that in due course.

Employment rights

Two significant decisions enhanced employment rights. In *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32 the protection of whistle-blowing legislation was extended to partners in a firm of solicitors, even though partners are not normally considered to be employees. And in *Hounga v Allen* [2014] UKSC 47 an illegal immigrant was held to be entitled to claim discrimination against her employer because her claim was not so closely connected to her illegal entry into the country that permitting recovery of compensation would appear to be condoning the illegality.

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